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Supreme Court, U.S.
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No. 96-1403

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

NATIONAL RAILROAD PASSENGER CORPORATION, a foreign corporation, and CHICAGO UNION STATION COMPANY, a domestic corporation,

Petitioners,

vs.

NANCY E. VAN HOLT and LOUIS VAN HOLT,

Respondents.

On Petition for Writ of Certiorari to the Appellate Court of Illinois, First District

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

This case went to verdict on plaintiffs' complaint premised on the FELA against Amtrak and common law premises liability against Chicago Union Station Company (CUS). The jury was instructed as to the elements of each separate cause of action. The same attorney represented both defendants. A joint and several judgment was entered against each defendant. The Appellate Court of Illinois granted Amtrak a new trial on damages only based on Federal evidentiary principles unique to FELA cases and affirmed the judgment against CUS, the State law defendant, there being no error as to it under Illinois law. Against this background, the questions presented are:

I. Whether jurisdiction of this Court is lacking because there is no final judgment as to Amtrak and CUS failed to raise the preemption issue below.

II. Does Section 5 of the FELA require gross benefits paid, rather than premiums, to be set off against the employee's recovery where Amtrak's sole outlay therefor was to pay a premium and no agreement exists between Amtrak and its employee to render Section 5 inapplicable?

III. Can CUS employ the Supremacy Clause to shrink its Illinois common law liabilities by claiming the FELA encompasses it too?

LIST OF PARTIES

Chicago Union Station Company is an Illinois corporation registered under the laws of that State. Throughout its petition, petitioners omit the designation "Company." Petitioners' statement that National Railroad Passenger Corporation is the parent company of Chicago Union Station Company misleads as the two are separate and distinct entities.

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OPINION BELOW

Petitioners' reference to "an earlier opinion" is misleading. The "earlier opinion" was not "modified." Rather, it became a nullity when withdrawn by the Appellate Court of Illinois and replaced by the official reported opinion. (Pet. App. 28) The "earlier opinion" contained glaring factual inaccuracies as to the alignment of the parties to the causes of action which, when recognized by the Appellate Court, resulted in issuance of the reported opinion necessitating clarification of the Court's holding. The Illinois Supreme Court denied leave to appeal and also petitioners' second attempt at review in the form of a Motion for Supervisory Order. (Resp. App. 1)

JURISDICTION

Respondents question this Court's jurisdiction to review the judgments below.

Amtrak has been fully accorded all its Federal rights which have yet to be finally determined in a possible retrial against Amtrak on damages only. A retrial may not be necessary because respondents will obtain satisfaction of the judgment against CUS from it or its appeal bond surety. Accordingly, a "final judgment" against Amtrak has not yet occurred and the issue it raises will become moot.

CUS's sole basis for review by this Court is that the Supremacy Clause of the United States Constitution grants it the right to be the recipient of Federal rights Congress gave only to railroad employers under the FELA. Chicago Union Station Company is purely a com-

mon law defendant for which no preemption is provided by the FELA. CUS did not raise the issue in the trial court.

STATEMENT OF THE CASE

To put matters in focus, certain cogent observations must be made:

1. No complaint was made in the courts below that the damages awarded to respondents were excessive.
2. Petitioners have never contested the fact that at the time of the occurrence, plaintiff Nancy Van Holt was engaged in the course of her employment and was on the private property of the common law defendant Chicago Union Station Company.[1] Thus, she was a business invitee as to CUS and an employee as to Amtrak.
3. The judgment against CUS is based on the failure of CUS to exercise its common law duty of ordinary care for plaintiff's safety and that against Amtrak on its FELA duty to provide her with a safe place to work. Pursuant to jury instructions delineating between the two separate causes of action, a joint and several judgment was entered; plaintiffs may satisfy their entire judgments against either defendant. In this case, it will be exercised against CUS and operate as a set off against the amount obtained against Amtrak on retrial, if any.

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[1] Petitioners' insistence on omitting the word "Company" throughout its petition is indicative of its attempt to relegate this Illinois corporation to less than a viable entity.

4. Both Amtrak and CUS permitted themselves to be represented from the inception of this case by the same attorney. That attorney acceded to all jury instructions and verdict forms. He neither tendered nor requested the trial court to treat the causes of action separately for damage purposes nor did he submit any instructions or verdict forms to the contrary. He did, however, tender to the trial court the instruction concerning taxes mandated for FELA cases by *Norfolk & Western Ry. Co. v. Liepelt*, 444 U.S. 490 (1980).
5. There is no place in this record showing respondents agreed that CUS would be entitled to FELA measure of damages.

Petitioners' statement of the holding granting Amtrak a set off of premiums paid for long-term disability insurance conveniently omits the fact that the Appellate Court held Amtrak failed to properly preserve this point for review. (App. 23) Amtrak's quest for a set off was for the gross amount paid and to be paid to plaintiff until she reaches her sixty-fifth birthday. However, there is no evidence in this record that Amtrak is providing the benefits from its own funds. Rather, the record reflects only that Amtrak paid a premium to an insurance company for the benefits. Moreover, on retrial it may appear that plaintiff had deductions taken for this insurance and thus paid for it herself.

Finally, in an effort to raise the Supremacy Clause as a basis for seeking review on behalf of CUS, petitioners go *dehors* the record and state, without citation to the record, that "plaintiff had previously acceded to imposition of the FELA measure of damages to both defendants." (Pet. p. 8) Rather, the record reflects that the jury was carefully instructed as to the law applicable to

each of the two causes of action against each defendant and no agreement allowing the FELA to preempt plaintiffs' State law cause of action can be cited to this Court. (Given and refused instructions, R. V5, C1130 *et seq.*)

Moreover, as demonstrated by the Appellate Court's opinion, while there may have been minor (arguably harmless) error unique to the FELA case, none appeared as to the common law case.[2]

REASONS FOR DENYING THE WRIT

I.

THERE IS NO FINAL ORDER AS TO AMTRAK AND THE QUESTION CUS ARGUES WAS NOT RAISED IN OR DECIDED BY ANY COURT BELOW.

The question Amtrak presents has yet to be finally determined at a retrial. What the final judgment will be depends on the outcome of a complete hearing on the

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[2] Petitioners' irrelevant discussion (Pet. p. 5) of the two FELA errors found by the Appellate Court glosses over the fact that they were errors the trial judge had no opportunity to commit.

First, Amtrak's statement concerning the trial court's refusal to allow evidence of taxes on plaintiff's lost future earnings omits reference to the fact that defense counsel first attempted to inject the question into the trial after plaintiff had been cross-examined as to her earnings without any mention of taxes and rested. Defense counsel then referred to a document apparently showing deductions from plaintiff's wages which was not introduced into evidence and no offer of proof was made. (R.V13, 18-23)

Second, insofar as the instruction substituting "loss of a normal life" for "disability" as an element of damages is concerned, defense counsel specifically stated he had no objection to it. (R.V13, 53-55)

issue. That this is the present status is clear from the holding of the Illinois Appellate Court that Amtrak failed to preserve this issue for review and thus the trial court "was not adequately informed as to the substance of the proffered evidence at trial." *Van Holt v. National R.R. Passenger Corp.*, 669 N.E.2d 1288, 1300 (1996), also App. 23.

Consequently, the finality requirement of 28 U.S.C. § 1257 is absent and review ought to be denied. *O'Dell v. Espinoza*, 456 U.S. 430 (1982), dismissing certiorari for want of jurisdiction where Colorado Supreme Court remanded case for trial. The issue at bar does not fit one of the "very few" exceptions to the rule because determination of the Federal question now will not terminate the necessity for remand. *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975).[3]

As to the question by CUS arguing the Supremacy Clause, the issue of preemption was not raised by CUS in the trial or appellate courts and thus was not passed on or decided below. This Court has refused to consider claims that were not raised in, addressed to or decided by any court below. *Yee v. City of Escondido*, 503 U.S. 519, 523-33 (1992); *Beck v. Washington*, 369 U.S. 541, 549-53 (1962). Accordingly, review of the judgment against CUS ought to be denied.

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[3] Additionally, a retrial involving the set off issue may never occur; thus the issue is moot at this point. Plaintiffs may satisfy the full amount of the judgment against CUS or its appeal bond surety. When that occurs the retrial against Amtrak will be moot. Under such circumstances, this Court has declined to consider the question presented. *DeFunis v. Odergaard*, 416 U.S. 312 (1974).

II.

THERE IS NO LACK OF UNIFORMITY IN COURTS' INTERPRETATIONS OF SECTION 5 OF THE FELA.

The Illinois Appellate Court fully followed established law concerning set offs of disability benefits in FELA cases. The significant point that Amtrak consistently and conveniently ignores is that all Amtrak had contributed toward the benefits that plaintiff received is the payment of that portion of a premium relating to the insurance therefor and there is no agreement between Amtrak and plaintiff to render Section 5 inapplicable.

Section 5 of the FELA specifically provides that a railroad employer may set off "any sum it has contributed or paid to any insurance, relief benefit, or indemnity that may have been paid to the injured employee***." Courts have consistently found that when it is applicable, Section 5 plainly does not provide for set off of "benefits received," but rather for a set-off of "any sum***contributed."

Accordingly, while the Appellate Court may or may not have correctly held that benefits plaintiff receives from disability insurance are not a collateral source and are therefore entitled to set off, it correctly concluded, in accord with uniform law and the plain language of §5, that under the record in this case Amtrak would be entitled to set off the premium paid for plaintiff's disability insurance and not for the gross amount of "benefits received."[4]

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[4] Because of Amtrak's failure to make a proper offer of proof and the unorthodox manner in which Amtrak belatedly injected this issue at trial, the entire subject was never fully

(continued...)

Folkestad v. Burlington Northern, Inc., 813 F.2d 1377 (9th Cir. 1987), is a definitive decision from the Ninth Circuit on this issue. It enumerated certain precepts pertaining to Section 5 gleaned from case law and concluded that set off of gross amounts paid was proper where a collective bargaining agreement contained a specific provision that entire benefits, rather than premiums, could be set-off against the employee's FELA recovery. As the foundation for its holding the court used Judge Friendly's oft cited statement in *Blake v. Delaware and Hudson Railway Co.*, 484 F.2d 204 (2d Cir. 1973), that:

> Under 45 U.S.C. §55 [Section 5 of the FELA], the railroad is entitled to set off the premiums, not what the premiums bought. This was recognized as long ago as *Bangor & Aroostook R. Co. v. Jones*, 36 F.2d 886 (1 Cir. 1919). If the railroads wish to avoid the harsh result reached by the district court, they can accomplish this by specific provision in the collective bargaining agreement. [813 F.2d at 1382].

The *Folkestad* court noted that "Judge Friendly in *Blake* was not suggesting that the amount of insurance benefits received can never be off set. His point was that if the employers wish the insurance to fulfil their liabilities under FELA, they should endeavor to negotiate a provision to that effect in the collective bargaining agreement." 813 F.2d at 1382-3. Accordingly, *Folkestad* held that set off would be allowed in that case as there was a collective bargaining agreement agreeing that it be done.

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[4] (...continued)
aired. It may well be that plaintiff paid for this insurance through payroll deductions. Accordingly, as stated earlier, it is submitted that the lack of finality dictates there should be no review of this issue at this time.

Significantly, after its exhaustive analysis, the *Folkestad* court concluded:

> "Given the facts of this case, the result we reach does not conflict with any of the holdings of the Supreme Court, or any Federal Court of Appeals decisions. No such cases have denied set-offs in the face of a collective bargaining agreement provision stipulating the purpose of the benefits in FELA cases." [813 F.2d at 1383]

The court had no problem in blending its decision with that of the Eighth Circuit in *Clark v. Burlington Northern, Inc.*, 726 F.2d 448 (8th Cir. 1984), on which Amtrak in the case at bar places principal reliance and where there was no collective bargaining agreement. This was because in *Clark*, the railroad was paying the entire disability benefit *out of its own funds*. This affirmatively appears from the court's statement that:

> Although an insurance company administered the plans, Burlington wholly funded them and they were not a part of any collective bargaining agreement. [726 F.2d at 451]

The Seventh Circuit reached the same result as *Folkestad* in *Burlington Northern, Inc. v. Strong* (1990), 907 F.2d 707, noting the existence of a comprehensive collective bargaining agreement which governed the employee's relationship with the employer. The court determined the entire amount of benefits may be set off "because of the terms of the agreement" and thus FELA §5 was "inapplicable." Further, as in *Folkestad* and in contradistinction to the case at bar, "Burlington paid the entire amount necessary to fund the SSB program." 907 F.2d at 714.

So too, in petitioner's case of *Allen v. Exxon Shipping Co.*, 609 F.Supp. 1545 (D. Me. 1986), the court took special note that "the Exxon disability plan is self-funded by the employer, and that payments made by [Exxon] into the plan 'are based upon the amount paid out to the disabled employees of Exxon.'" 639 F.Supp. at 1548.

Obviously, in sharp contrast to the case at bar, the covered employers in *Clark*, *Folkestad* and *Allen* were entitled to set off the benefits received by the employees because, in accord with the strict and plain terms of Section 5, each had "contributed or paid" the entire benefit to the employee, as opposed to only a premium.

In sum, in the case at bar, the only matter appearing of record is that Amtrak may have paid a premium toward the insurance which is paying benefits to plaintiff. In addition, on remand to the trial court, it may well appear that plaintiff had deductions taken from her paycheck for this insurance in which event Amtrak would be entitled to no set-off whatsoever. *Folkestad*, 813 F.2d at 1380, and cases cited therein.

It should also be noted that in addition to the lower court's finding that Amtrak failed to preserve this point for review, the insurance contract itself is laden with contingencies which will cause cessation of payments or a reduction thereof. For example, it provides that "payment of future benefits will depend on certification of your continuing disability, and on other, applicable contract provisions." It further provides that long-term disability benefits are reduced by any other benefits received, such as social security paid because of dependents and employer pensions, including the railroad retirement payments. It noted continuing updates on the

payee's physical condition were requested through examinations by the insurance company physician and will only continue "while under the care of a licensed physician." (R.V7 C1544-C1545) [5]

It is submitted that contrary to Amtrak's claim of the need for this court to establish a "uniform rule," a uniform rule already exists. This is a case where there is no collective bargaining agreement to render FELA §5 "inapplicable" nor is there any self-funding by Amtrak so as to entitle it to set off gross payments. As such, the plain and unambiguous terms of Section 5 apply and based on the present state of the record on this issue the Appellate Court was correct in holding that Amtrak was entitled to set off premiums only.

III.

THE FELA DOES NOT PREEMPT PLAINTIFFS' ACTIONS AGAINST A PROPERTY OWNER SUED PURSUANT TO STATE COMMON LAW.

In this case a joint and several judgment has been entered against two separate defendants. One is Amtrak charged in count I of plaintiff's third amended complaint under the FELA and the other is CUS charged in count II with failing to use ordinary care in the maintenance of its property. Count III was for Mr. Van Holt's loss of consortium which was brought only against the property

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[5] Indeed, as to future benefits, the trial court inquired whether defense counsel would be willing to stipulate that plaintiff would receive these benefits to age 65 and counsel's vague and equivocal response was, "There is no guarantee that anybody is going to be guaranteed wages or fringes for the rest of their life under any circumstances." (R.V11, 209-210)

owner, CUS. (R. V5, C1124)[6] The jury was carefully instructed as to the separate causes of action; defendants neither requested nor tendered any instructions separating damage elements as to each cause of action. See given and refused instructions at R. V5, C1130 *et seq.*

Both defendants were represented by the same attorney who made no attempt to distinguish the rights of his respective clients, such as by the filing of a counter-claim for contribution or an affirmative defense of preemption in the cause of action against CUS. In Illinois, preemption is an affirmative defense which must be plead. *Haudrich v. Howmedica, Inc.* (1996), 169 Ill.2d 525, 662 N.E.2d 1248, 1254. In addition, as stated, the preemption issue was not raised by CUS in the courts below; it ought not to be allowed to be raised to this Court. Thus, petitioners' "surprise" at this issue allegedly appearing for the first time at the Appellate Court's issuance of its official opinion is, at most, a feigned contention.[7]

While the foregoing is sufficient to dispose of this point, it is nonetheless clear that the FELA only preempts application of State law against Amtrak. Here, the proclaimed errors unique to the FELA case are conceded not to be errors as to the common law case against CUS.

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[6] The FELA does not permit actions for loss of consortium against railroads. *Jess v. Great Northern R. Co.*, 401 F.2d 535 (9th Cir. 1968).

[7] Petitioners ignore that the withdrawn opinion of the Appellate Court commenced with the erroneous statement that in addition to the FELA, "Amtrack" [sic] was sued under the common law and that Mr. Van Holt sued Amtrak for loss of consortium. (App. 31) When the court issued its official opinion, these errors were corrected. Thus, it was the correction of the erroneous statement of the Appellate Court which led it to conform the result.

See *Klawonn v. Mitchell* (1985), 105 Ill.2d 450, 475 N.E. 2d 857, (*Liepelt* not to be followed in a non-FELA case) and *Smith v. City of Evanston* (1994), 260 Ill.App.3d 925, 631 N.E.2d 1269 ("loss of a normal life" to be given in lieu of "disability" in State common law cases.)

Further, it is clear that nothing stated by Congress in the FELA, 45 U.S.C. §51 *et seq.*, dictates that an FELA action either expressly or impliedly preempts plaintiff's rights against a common law non-FELA defendant separately joined in the same case on a State law theory.

It is axiomatic that the scope of the FELA is "to cover the subject of liability of railroad companies to their employe[e]s injured while engaged in interstate commerce." *Michigan Central R.R. Co. v. Vreeland*, 227 U.S. 59, 66 (1913); *New York Central & Hudson River R.R. Co. v. Tonsellito*, 244 U.S. 360 (1917). When, for example, a third party action for contribution arising out of the FELA is involved, State law will govern as it is an action between the railroad and a third party, not an employee. *Shields v. Consolidated R. Corp.*, 810 F.2d 397 (3rd Cir. 1987). At bar, respondents' causes of action against CUS clearly do not arise under the FELA as CUS is not a railroad employer and respondents are not employees of CUS, but merely business invitees governed by Illinois premises liability law.

Additionally, plaintiff Nancy Van Holt had a right to join a tort-feasor who was liable to her only at common law with a defendant who was liable to her only under the FELA. 45 U.S.C. §56 grants concurrent jurisdiction over FELA actions to State courts without any restrictions. And, Illinois practice clearly permits such joinder. See 735 ILCS 5/2-405 permitting joinder of defendants jointly or severally, 735 ILCS 5/2-613, permitting plead-

ing separate causes of action in separate counts, and 735 ILCS 5/2-614 permitting the joinder of causes of action against separate defendants.

Clearly, the two causes of action proceeded through the trial court on separate tracks and it was up to two-hatted counsel defending petitioners to preserve whatever distinctions he thought necessary for the proper representation of those parties.

CUS's scant review of the law on this issue is misleading. While it cites generic case law to the effect that a railroad's rights under the FELA cannot be infringed upon by State law, no citation appears to support its novel contention that the Supremacy Clause requires a court to place a common law non-FELA defendant within the ambit of the FELA. If it were as CUS claims, business invitees who are injured at Union Station could file suit against it under the FELA. It is submitted that this Court's expected reaction to such a proposition demonstrates the folly of CUS's argument.

Petitioners quote a passage from the opinion below which cites *Argueta v. Baltimore & Ohio Chicago Terminal R. Co.* (1991), 224 Ill.App.3d 11, 586 N.E.2d 386, asserting that it supports their position. (Pet. pp. 17-18) However, *Argueta* held only that a railroad was entitled to a new trial on the issue of damages due to failure of the trial court to apply FELA evidentiary principles at the trial against the railroad. In *Argueta*, there was a common law defendant at trial which had settled out.

Accordingly, the Illinois court in *Argueta* did not decide the FELA preempted the common law action so as to cloak the common law defendant with FELA protection. Consistent therewith, at bar, the court below pointedly held that "federal evidentiary principles must be applied

in the FELA claim" and noting that Amtrak was "the sole defendant in the FELA claim" granted a new trial to Amtrak only "with respect to the FELA claim." (App. 15)

In sum, only Amtrak was covered by the direct pre-emptive effect of the FELA. Congress had no intent of preempting the law applicable to a non-FELA defendant proceeded against in State court pursuant to State premises liability principles; Amtrak has been accorded the full purposes and objectives of the Congressional act. *Fidelity Federal Savings & Loan Assn. v. De la Cuesta*, 458 U.S. 141, 153 (1982).

CUS simply cannot get into the Act.

CONCLUSION

Plaintiff-respondent Nancy Van Holt was injured ten years ago. She is entitled to closure. The letter of the FELA has been applied to Amtrak and further delay ought not to occur based on CUS's claim of an imaginary agreement that does not appear of record.

The petition for writ of certiorari ought to be denied.

Respectfully submitted,

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RESPONDENTS' APPENDIX

(Letterhead Of)

SUPREME COURT OF ILLINOIS
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January 22, 1997

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THE COURT HAS TODAY ENTERED THE FOLLOWING ORDER IN THE CASE OF:

No. 81778—Nancy E. Van Holt et al., respondents, v. National Railroad Passenger Corporation, etc., et al., petitioners.

Motion by movants for a supervisory order. Motion *denied.*

JH:lgr
cc: Mr. Robert H. Joyce
Mr. Donald J. Nolan